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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

Mitchell R. Swartz, Plaintiff,
Petitioner

v.

Schering-Plough Corporation, Plough U.S.A.,
Schering-Plough Healthcare Products,
Defendants,
Respondent

On Petition For A Writ Of Certiorari
To United States Court Of Appeals
For The First Circuit
No. 02-1001

Appealed from: United States District Court
District Of Massachusetts
(Civil Action No. 99-CV-10177)

PETITION FOR A WRIT OF CERTIORARI

Mitchell R. Swartz, ScD, MD, EE
P.O. Box 81135
Wellesley Hills, MA 02481-0001

April 9, 2003

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46 pp

QUESTIONS PRESENTED

Whether the Court erred by denying equivalent applications of law.

Whether the Court erred by failing to comply with Judge Young's Order regarding "information" transfer.

Whether the Court erred by failing to comply with Judge Young's Order regarding Plough to answer the Complaint - or be found in Default.

Whether the Court erred by failing to comply with Judge Young's Order regarding the Adjoining of Dr. Berlin.

Whether the Court complied with the standards of review regarding whether Two Inventions Are Identical, Definition under 35 U.S.C. §102.

Whether The Court Erred By Ignoring That SUN-BUG Information Was Delivered To, Received By, Transmitted Within, And Discussed Internally At Plough.

Whether The Court Erred By Ignoring That Defendants Shared SUN-BUG Information With At Least Two Companies Proving Utilization.

Whether the Court erred by Ignoring the Court Order of December 1999 for Discovery was not Carried Out.

Whether the Court erred by ignoring that there Is Not A Conflict Regarding Dr..Berlin.

Whether the Court erred by denying access to a fair trial.

Whether the Court erred by being biased against Petitioner with respect to Rule 7.1.

Whether the Court erred by Ignoring Defendants' False Statements And Inconsistencies.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

The list of all parties in the proceedings in the court is as follows:

Petitioner, previously Appellant and Plaintiff: Dr. Mitchell Swartz, P.O. Box 81135, Wellesley Hills, MA 02481-0001.

Respondents: Schering-Plough Corporation, Plough U.S.A., Schering-Plough Healthcare Products,

The Respondent's attorneys of record are John J. Curtin, Jr., Sarah E. Mizner, Heidi A. Nadel, and Julia Frost Davies, **BINGHAM DANA**, 150 Federal Street, Boston, MA 02110.

The panel in the court of appeal, the United States Court Of Appeals For The First Circuit, No. 02-1001, are Judges Boudin, Chief Judge, Torruella, Circuit Judge, and Lipez, Circuit Judge.

**** - Plough evolved and after subsidiaries and mergers includes Schering-Plough and Schering-Plough Healthcare Products. Herein, the three Schering-Plough Defendants are for simplicity collectively called either "Plough" or "Schering-Plough".

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Supreme Court of the United States

On Petition For A Writ Of Certiorari
To United States Court Of Appeals
For The First Circuit
No. 02-1001

[Appealed from: United States District Court
District Of Massachusetts
(Civil Action No. 99-CV-10177)

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States court of appeals which appears at Appendix A in the present petition.

**** The Notations herein are to the Appendix of this Petition (e.g., App. A) and those made to the US court of appeals, in the Appeal Brief (e.g., AB12 for page 12), Appellant's Appendix (A123) or Addendum (AD12).

OPINIONS BELOW

The opinion of the court of appeals [United States court of appeals for the `First circuit] appears at Appendix A.

JURISDICTION

The jurisdiction of this court is invoked under Federal question jurisdiction authorized by Article III [28 U.S.C. §1331], Article IV, and Article I Section 8 of the United States Constitution, and by the Tenth [*Osborn v. Bank of United States*, 22 U.S. (9 Wheat) 738 (1824)) and the Fourteenth Amendments, and because the claim in the district court involves breach of contract filed against corporations located outside of Massachusetts (diversity). The mere possibility that a question of federal law might arise is sufficient to satisfy the "arising under" jurisdictional authorization of Article III [*Marbury v. Madison*, 1 Cranch 137, 177 (1803), Chief Justice Marshall].

The date on which the court of Appeals decided Petitioner's cases was 9/24/02. A copy of the court's decision appears at Appendix A (App. A) in the present petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This court is the petitioner's last and only source of relief, and for reasons stated in detail below, the United States Supreme Court should consider examining whether to exercise its supervisory power .

This Petition involves a direct grant of authority because the court of appeals ignores that judgment, and a report upon which it is based, failed to apply the normal federal standards of review and failed to comply with federal law.

This Petition involves a direct grant of authority because the court of appeals ignores that the petitioner (then appellant) informed the court of important federal issues which far departed from the accepted and usual course of judicial proceedings, including inconsistency with previous decisions of two judges in the same case.

This Petition involves a direct grant of authority because the decision of the court of appeals did not discuss the substantive, serious and indelible issues cited in the submitted appeal, and reply, briefs.

This Petition involves a direct grant of authority because the court misapplied 35 U.S.C. 102, and provisions of Article I, §8, cl. 8 of the United States Constitution.

This Petition involves a direct grant of authority because of Article III, Article IV, and the Fourteenth Amendments. With Article III,the mere possibility that a question of federal law might arise is sufficient to satisfy the "arising under" jurisdictional authorization of Article III [*Marbury v. Madison*, 1 Cranch 137, 177 (1803), Chief Justice Marshall].

This Petition involves a direct grant of authority because of the Tenth Amendment [*Osborn v. Bank of United States*, 22 U.S. (9 Wheat) 738 (1824)).

BASIS OF FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The claim in the district court involves breach of contract filed against corporations located outside of Massachusetts and therefore Federal question jurisdiction is authorized by diversity.

Federal question jurisdiction is also authorized by Article III [28 U.S.C. §1331], Section 8, Article I of the United States Constitution, and the Tenth Amendment [*Osborn v. Bank of United States*, 22 U.S. (9 Wheat) 738 (1824)). As Chief Justice Marshall has indicated, the mere possibility that a question of federal law might arise is sufficient to satisfy the "arising under" jurisdictional authorization of Article III (underlined for emphasis).

CONCISE STATEMENT OF MATERIAL FACTS

The Complaint in the District Court involves breach of contract filed against drug corporations located outside of Massachusetts (diversity). In his Memorandum and Decision, Chief Judge William Young, 6/17/1999 [hereinafter "Decision" (excerpt in Appendix "B", attached], denied Defendants' Motion to Dismiss said claim. Petitioner (plaintiff in the above-entitled action) is a Massachusetts inventor and physician. In 1975, while a medical student at Harvard and MIT, petitioner developed and invented a "dual protection" outdoor product called "SUN-BUG" to improve protection from sun exposure and some insects. The embodiment included the logo "SUN-BUG" and a formula of pure N,N-diethyl *meta*-toluamide at 10% [discussed on pages AB19, and AB5-AB9] sent to Plough which led to Schering Plough's knockoff BUG&SUN (A4,A5,A10,A65,A81)]. As reviewed in Appendix "D"

(attached), Petitioner became business partners with Dr. Robert Berlin to market SUN-BUG. [A8,A21]. Because of family associations between three of the four SUN-BUG business partners and both the founder of Plough (thereafter becoming the other corporate defendants), Mr. Abe Plough, and Mr. Harry B. Solmson (the son-in-law of the founder and eventual CEO of the company), the parties entered into a series of discussions which led to a contract entered into between the parties by their oral statements, acts and deeds between 12/75 and 4/76, and based upon long-standing good faith and trust (A1,A2,A11; also A1-A85).

Based upon the Agreement of confidentiality and trust, the SUN-BUG business partners sent SUN-BUG information to Plough (A8,A11,A21,A65,A81). Said transferred SUN-BUG information was examined and then discussed internally (A10, also A9,A11, A21; also A34,A65,A81,A55,A202,A231). Mr. Solmson's deposition admits that he shared the SUN-BUG technology with at least three individuals within Plough (A10, A36) and an individual at Coppertone (A10). Shortly thereafter, Mr. Solmson informed the SUN-BUG partners that the company declined to proceed at that point in time but if they decided to move ahead with SUN-BUG, then they would contact the SUN-BUG partners.

Thereafter, Plough did not adhere to the confidential Agreement regarding future use of SUN-BUG (A3-5). There were violations of the confidential SUN-BUG information transfer Agreement to Plough when Plough shared the SUN-BUG information with both Coppertone and Company "X". This is a breach. In addition, work at Plough also continued on SUN-BUG. Plough used the identical 10% N,N-diethyl meta-toluamide conveyed as information from petitioner to the respondents (A4,A5,A55). Plough's BUG&SUN is an identical knockoff of the individual inventor's SUN-BUG, in material identity, formula, in the angle between the side groups on the molecule, and even in the amount of that material present. Schering-Plough used and profited by the SUN-BUG information given to it without contacting petitioner or Dr. Berlin. This is a breach. Under the well-established standards for summary judgment, there are clearly genuine issues as to many material facts and that the defendants are not entitled to summary judgment as a matter of law. [Fed. R. Civ. P. 56(c)].

REASONS FOR GRANTING THE WRIT

I

Briefly, the gravamen of petition involves that the petitioner requests compliance with the 6/1999 Decision of Judge Young [A202,A231; *Swartz v. Schering-Plough Corp.*, 53F.Supp.2d95, 103 (1999)].

A. The court is inconsistent with Chief Judge William Young who ruled (A202,A231) that SUN-BUG "information" is relevant, that there was a two-part Agreement, and that Dr. Berlin and Dr. Swartz were partners who could pursue the contract claim, and that Plough was a defendant. The court allowed that petitioner could prove that there has been detrimental reliance on the promise of Mr. Solmson and Plough which by the standards of review should reasonably be enforceable as a contract to avoid injustice [Judge Young cited this noting [*Loranger Constr. Corp. v. E.F. Hauserman Co.*] 376 Mass. 757, 760-61, 384 N.E.2d 176, 179-80 (1978) (citing Restatement (Second) of Contract § 89B(2) & Illus. 6 (Tent. Drafts Nos. 1-7, 1973) and noting that this principle comports with "traditional contract theory antedating the modern doctrine of consideration."]. Furthermore, in Massachusetts as the court noted there is an implied covenant of good faith and fair dealing between the parties to a contract. The implied covenant of good faith and fair dealing means that neither party may do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Fortune v. National Cash Register Co.*, 373 Mass. 96, 105, 346 N.E.2d 1251, 1257-58 (1977). Instead of complying with the decision, the respondents hired the law firm with which the Chief Judge was associated forcing his recusal, and immediately thereafter the respondents forced a *nunc pro tunc* rewording of said Decision (A177,A202,A231) altering said 1999 Decision [A202,A231] and changing the relevant word from "information" to "documents".

B. The court is inconsistent with normal standards of review because there is direct evidence that the SUN-BUG Group transferred the SUN-BUG technology to Plough pursuant to the confidential agreement which was based upon years of close family ties, long-standing trust, confidence and fiduciary responsibility. To counteract the substantial evidence of five (5) deponents who have confirmed SUN-BUG information transfer

(A9,A11,A21,A34,A65,A81, A55,A202,A231) followed by Defendants discussing said SUN-BUG information internally (A10), the Defendants' counsel took a "second bite of the apple" attempting to overturn Judge Young's Order and Memorandum. There is also direct evidence that after said transfer of said SUN-BUG information to Mr. Solmson et alia at Plough, the record reveals that the SUN-BUG information was utilized by the drug companies to make BUG&SUN. In this case, an offer of willingness to enter into a contract was made with the intent that the SUN-BUG business partners accepted, and then transferred the SUN-BUG information. This heralds acceptance of the offer, and given said transfer and receipt of said information, there was an agreement by fact [*Wilder v. Manley*, No. DCA924409H, 1994 WL 902879, at 3 (Mass. Super. October 7, 1 994)]. Plough should be held responsible for consequences of its acts including that it received a prolonged benefit from the SUN-BUG information, which continued even as the above-entitled action was filed.

C. The court is inconsistent with Chief Judge Young (A202,A231) because, regarding Dr. Berlin, the Defendants have systematically silenced the Decision of the Judge, denying Dr. Berlin the right to contribute to the above-entitled action [Mass.Gen.L. ch.108A,§9(1)(1998); *Wilder v. Manley* [No.CA924409H, 1994 WL 902879, at 3 (Mass.Super.Oct. 7, 1994)].

II

The court did not follow the standards of review or other decisions of the court by allowing summary judgment to proceed in light of the record below. A. Summary judgment is only proper after an adequate period for discovery [*Vaughn v. United States Small Business Admin.,65 F.3d 1322, 1325 n. 1 (6th Cir.1995)],* **which was not allowed in this case.**

B. Summary judgment is improper because petitioner demonstrated SUN-BUG information was transferred, discussed, and utilized by the Defendants, corroborated by submitted Affidavits and evidence in the record which convincingly supports genuine disputes over facts that will effect the outcome of the contractual claim. [*Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed. 202 (1986).] This is a "genuine issue" of such a nature that it is important within the prism of the J. Young's Decision of June 1999.

C. Summary judgment is improper because Defendants withheld records, and there was admitted spoliation of records. It would be a wiser course to proceed to trial [*Anderson v. Liberty Lobby, Inc.*].

D. Summary judgment is improper because of two (2) affidavits and testimony of five (5) deponents demonstrated genuine issues as to material facts proving defendants are not entitled to summary judgment as a matter of law. [Fed. R. Civ. P. 56(c)], especially within the prism of the J. Young's Decision of June 1999 [*Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 594 (11th Cir.1995)].

E. Summary judgment is improper because the Court relied upon affidavits of Defendants' counsel, whereas to support a summary judgment motion, an affidavit must be based on personal knowledge [*Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir.1996); *El Deeb v. University of Minnesota*, 60 F.3d 423 (8th Cir.1995); *Leary v. Dalton*, 58 F.3d 748,754 (1st Cir.1995)]. Defendants' counsel "cherry-picked" portions of the Depositions to evade justice and therefore said affidavits are inaccurate and are not proper [*Automatic Radio Mfg. Co. v. Hazeltine Research Inc.*, 339 U.S. 827, 831, 70 S.Ct. 894, 896, 94 LEd. 1312 (1950); *Tavery v. United States*, 32 F.3d 1423, 1426 n. 4 (10th Cir.1994); *Conner v. Sakai*, 15 F.3d 1463, 1471 (9th Cir.1993), cert. granted; *Toro Co. v. Krouse, Kern & Co.*, 827 F.2d 155, 162–63 (7th Cir.1987)]. Counsels' conclusory averments [*Cifarelli v. Village of Babylon*, 93 F.3d 47, 51 (2d Cir.1996)] and self-serving statements [*Evans v.Technologies Applications & Serv. Co.; Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir.1991)] without benefit of firsthand observation [*Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 659 (7th Cir.1991)] are improper. This is important because said affidavits were submitted under Rule 56(c) or Rule 56(f) in bad faith. The errors were noted by Plaintiff and were of a relevant substantial nature – including spoliation and withholding of evidence from a federal Chief Judge. A court should have held the Defendants in contempt and ordered them to pay reasonable expenses [*Evans v. Technologies Applications & Serv. Co.; Pastore v. Bell Tel. Co. of Pa.*, 24 F.3d 508 (3d Cir.1994)] but has not.

F. Summary judgment is beneath the standards of review because the plaintiff filed an affidavit explaining the inability to

fully present facts to oppose the motion because of limited discovery [*Public Serv. Co. of Col. v. Continental Casualty Co.*, 26 F.3d 1508 (10th Cir.1994). Therein, the plaintiff (now petitioner) made an extensive affirmative showing that defendants had made misstatements as to several material facts in issue and that they, by their own wrongful acts (such spoliation to which Mr. Solmson, in his deposition, admitted) have attempted to wrongfully defeat the plaintiffs claim. Accordingly, the plaintiff has shown competent credible evidence to rebut and dispute the motion for summary judgment [*Mesnick v. General Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991), *P. & JY. of Kingston. Inc. v. Massachusetts Commission Against Discrimination*, 20 F.Supp.2d 153, 155 (D.Mass 1998)] and to support the plaintiffs complaint. In this case, on the basis of the many irregularities in the Defendants' pleadings which were pointed out in detail to the Court, the Court should conclude that a fuller factual development is necessary [*Kennedy v. Silas Mason Co.*, 334 U.S. 249, 68 SCt. 1031, 92 L.Ed. 1347 (1948)].

QUESTIONS PRESENTED

Whether the Court erred by denying equivalent applications of law.

Whether the Court erred by failing to comply with Judge Young's Order regarding "information" transfer.

I

The Court has not followed the standards of review established by Judge Young's Order and Memorandum which accurately, precisely and substantively, discusses "information" and not merely documents, as the Defendants' counsel pretends and managed to get the report to rubber-stamp (A177,A202,A231). Judge Young specifically described, after he read the Complaint, the word: "information", and not "documents" or "delivery method", despite the fact that Defendants have repeated over and over that he did. By contrast, in the later erroneous rubber-stamped report, there results from this error numerous inconsistencies with the Decision and Order of Judge Young (A202,A231) and the standards of review (*supra,infra*). This rubber-stamping was obtained by Defendants' "second bite of the apple" and bad faith as they have tricked the court to ignore the Decision of Judge Young (1999) which precisely and accurately specifies and refers to "information". Why? The Report, with its change

of "information" to "*documents*" is clearly egregious because Mr. Solmson's deposition has revealed that Defendants routinely destroyed such documents after the information and ideas were received and discussed. Plough and Schering-Plough Defendants have had an *a priori* policy, a conspiracy among the drug companies, according to the deposition of the President of Plough, to glean submitted information and leave no written records. The systematic cover-up of submitted ideas by leaving no –apparent– written records would not be revealed until January 13, 2000. Defendants admit they discussed SUN-BUG with Dr. Berlin, and Mr. Solmson admits he discussed this among his staff extensively. Mr. Solmson also has reluctantly admitted that the Defendants systematically and routinely since the 1970s destroyed all written records of ideas received from outside the company. Given the transmission, discussion and sales, it can be inferred that Schering-Plough utilized the information supplied by Dr. Swartz.

II

It is wrong for the Court to adopt this language shift in midstream at the request of the Defendants because it is inconsistent with Judge Young's Order and Memorandum. It is wrong for the Court to adopt this language shift because the Defendants admitted in Solmson's deposition that Plough would routinely destroy documents associated with incoming product ideas. In this case, the SUN-BUG information transfer is a "genuine issue" of such a nature that it is important within the prism of J. Young's Decision of June 1999. In this case there is BUG&SUN with identical formulation, qualitative and quantitative, to SUN-BUG after the information transfer, and its distribution, and utilization (A3-A7).

Whether the Court erred by failing to comply with Judge Young's Order regarding Plough to answer the Complaint - or be found in Default.

The Report ignored Affidavits, Exhibits and Motions (A119,A128,A132,A136) and inaccurately purported, based upon rubber-stamping the Defendants' counsel's false statements to the court.

"*Abe Plough was the founder of Plough, Inc., now known as Schering-Plough Corporation.(sic)*"

[Report And Recommendation, 9/27/01]

A. Petitioner demonstrated in the Appeal Brief [pages AB31 and AB18] using evidence from the record below, that Plough

is a separate entity from Schering-Plough and from Schering. It is a "wholly-owned subsidiar(y)" and not "*simply the former name of Schering-Plough HealthCare Products, Inc.*" which the Defendants have inaccurately stated to the Court. Plough is a separate entity, with which Plaintiff interacted and to which the SUN-BUG information was sent (A9,A10,A55,A202), and which was hidden in the above-entitled action from discovery.

May it please the court that Plough's President, Mr. Mark Kirn, was served by a Sheriff, and the return was sent to the Court (A117). Mr. Kirn defaulted, but he is recognized by the Plough workers at "3030" -the location cited explicitly on page 33 of the sealed Supplemental Appendix "O"- as their President, and their published Memoranda use "Plough" as their name. Corroborating this, attention of the court is directed to page 33 of the sealed Supplemental Appendix "O". It can be seen that the address of the Defendants is exactly the location, "3030", which they originally reported did not exist. This is important because Defendants Schering-Plough Corporation and Schering-Plough Healthcare Products purport that Plough has not been in existence since 1990, but their Securities and Exchange Commission documents from 1994, 1996, and 1999, signed by the Defendants (A202,A231,A119,A128,A132,A136), indicate their statements to this court are self-serving but not accurate.

Whether the Court erred by failing to comply with Judge Young's Order regarding the Adjoining of Dr. Berlin.

After Chief Judge Young's Order, Dr. Berlin was allowed to be adjoined. Chief Judge quoted from *Wilder v. Manleo*, No. CA924409H, 1994 WL 902879, at 3 (Mass. Super. Oct. 7, 1994) (Lauriat, J.) ("As between the parties, the question of partnership or joint venture is one of intention that must be proved by an expressed agreement, either written or oral] , or be inferred from the acts or conduct of the parties.]. Dr. Berlin has a right to bring suit because "[e]very partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he/she is a member binds the partnership [Mass. Gen. L. ch. 108A, § 9(1) (1998)]. The court was unfair to demean him, and to stifle his voice, and to ignore his depositions and testimony.

Whether the Court complied with the standards of review regarding whether Two Inventions Are Identical, Definition under 35 U.S.C. §102.

To dismiss this case, the Report made grossly and egregiously inaccurate statements (supra), and relied on a cited patent of 1971 which was not mentioned in 1975 or thereafter until 2000, and involving neither SUN-BUG nor BUG&SUN. Furthermore, the Report misquotes the inaccurate statement of Defendants' counsel and then gives Schering-Plough credit for *"a product which dates back to the 1940s"* which also is neither SUN-BUG nor BUG&SUN.

> *"Schering has submitted the copy a patent for just such a product which dates back to the 1940s. (#171 ¶11; #172, Exh. G)"*
> [Report And Recommendation, 9/27/01]

THE TRUTH - The Cited Patent Is For Ethylene-Maleic Anhydride Copolymer

The Report erroneously presumes SUN-BUG and the cited patent(s) are the same, but they are not. The Defendants' cited patent teaches only the simplest ethylene-maleic anhydride copolymer solution, and is intended to, and does, serve a different purpose than does the formula and composition defined by SUN-BUG at 10% pure N,N-diethyl meta-toluamide –identical in the knockoff BUG&SUN. Defendants have shown no relevance of said patent or even assignment of said patent, or explained how it could violate a previous Agreement both *ex parte* and *nunc pro tunc*. The Report is therefore inconsistent with the standards of review which must be used when considering a patent (A55,A202,A231; and in the Appeal Brief on pages AB20-AB23).

Where was the suggestion of using pure N,N-diethyl meta-toluamide at 10% for prolonged outdoor use as engineered for SUN-BUG? Not in the cited patent. The cited patent does not suggest, allude to, or teach a composition, use, name, and structure as defined by SUN-BUG as should be apparent merely by considering toluamide in SUN-BUG (and its knockoff BUG&SUN). Furthermore, as discussed on pages AB24; also AB20-AB23, the patent is not assigned to Plough. Plough is not listed on the heading. There is no evidence that the cited patent is, or was, Plough's.

Furthermore, said patent was not mentioned in 1975 or 1976 or for decades thereafter. If Plough and Solmson had the patent at that time, then they would have cited it. They did not. Therefore, the Agreement must stand independent of any irrelevant, patent used by one party after the Agreement. Most importantly, the cited patents are not relevant because neither is the SUN-BUG formulation, concentration or product or the BUG&SUN formulation, concentration or product. The cited patent claims ethylene-maleic anhydride copolymer which is not relevant to SUN-BUG or it's knockoff BUG&SUN. By contrast, they use SUN-BUG's formula of pure N,N-diethyl *meta*-toluamide at 10% [discussed on pages AB19, and AB5-AB9; and which is identical to sample "DB" (7 grams) sent to Plough and to that contained in the knockoff BUG&SUN (A4,A5,A10,A65,A81)].

LAW

The Court has not followed the normal standards of review involving patents which are used when considering if two inventions are "identical" or "just such a product" (A55,A202,A231). The following three (3) examples are the normal standards of review. As discussed on pages AB22; also AB20-AB24, the standard of review involving patents, and the definitions of "identical" or "new", is discussed in *In re Arkely, Eardley and Long* [172 U.S.P.Q.524,526(CCPA, 1972)] (Appendix "C"). In this case, the cited patent is NOT the same. Therefore, the cited patent is not relevant and is relied upon improperly. This was forcefully stated in *Orthopedic Equipment Co. Inc. v United States*, 217 U.S.P.W. 193, 199 (CAPC 1983) (Appendix "C"). Finally, corroboratory proof that the cited patent leads away from SUN-BUG, is that the courts have affirmed that all claims must be used [Court of Custom and Patent Appeals, *In re Langer and Haynes*, 175 USPQ 169, 171 (CCPA 1972)](Appendix "C")..

Whether The Court Erred By Ignoring That SUN-BUG Information Was Delivered To, Received By, Transmitted Within, And Discussed Internally At Plough.

The Defendants' counsel falsely purported to federal judges (and the Boston Globe) that not a "*single piece*" of SUN-BUG information made its way from the SUN-BUG partners to Plough. However, there is significant, compelling evidence

from five (5) deponents who say that the SUN-BUG information was sent to, received by, discussed within, and used by, Plough. Despite the fact that the Defendants' counsel purported Chief Judge Young (and later Judge Gertner) that Plough knew nothing of SUN-BUG, many individuals at Plough (later the Schering-Plough) did know quite a bit. Plough got the SUN-BUG idea - from the SUN-BUG partners, with 10% N,N-diethyl meta-toluamide as the insect repelling portion (A4) as was discussed by Mr. Solmson within the company (A11,A81) and posted thereafter years later on the front side of each and every BUG&SUN bottle (A5).

As discussed in the Appeal Brief on pages AB5-AB7 and AB18, the SUN-BUG information transfer was confirmed by Ms. Solomon at her deposition, and by Ms. Berlin at her deposition, and by Dr. Berlin at his deposition. The SUN-BUG information was received by, examined at, and then discussed in, Plough (A10). Mr. Solmson widely discussed the formula and idea within Plough with four individuals (A36, A10) and the founder himself (A9-A34,A36,A202). Mr. Solmson shared the SUN-BUG information widely and internally within Plough, right up to the founder himself (A9-A34,A36,A202).

Corroborating the transfer of the SUN-BUG information is physical evidence in the form of the inadvertently leaked cover-sheets. As discussed in the Appeal Brief on pages AB30 and AB25-AB27, said cover-sheets [as Exhibits #151, 152, 250 and 251] were withheld; cf. A151]. However, they document a pedigree line beginning with Plaintiff's "SUN-BUG", mutating through "SUN&BUG", and finally arriving at the knockoff BUG&SUN (A1,A2,A149). Further corroborating the transfer of the SUN-BUG information, even though the Defendants erudite and eloquent counsel purported there was no knowledge of SUN-BUG, as discussed in the Appeal Brief on pages AB18 and AB5-AB9, on at least two occasions, SUN-BUG information was delivered (A9,A11). As discussed in the Appeal Brief on pages AB18, Mr. Solmson admitted discussing the SUN-BUG technology with Dr. Berlin (A44). All received papers were destroyed after the information was gleaned, according to Mr. Solmson.

The fact that each deponent knew of the information transfer (A9,A11,A21,A34,A65,A81,A55,A202,A231), and that the Defendants admitted receiving the SUN-BUG information

(A10), there is probative evidence to defeat summary judgment, because a jury would reasonably find in the Plaintiff's favor [*Anderson v. Liberty Lobby, Inc.*,477 U.S. 242, 248-52, 106 SCt. 2505, 2510-12, 91 L.Ed.2d 202 (1986)]. In fact, given the Defendants' withheld records, and destroyed records, and their prolonged and systematic attempts to shift "information" to "documents", it is a wiser course to proceed to trial [*Anderson v. Liberty Lobby, Inc.*].

Whether The Court Erred By Ignoring That Defendants Shared SUN-BUG Information With At Least Two Companies Proving Utilization.

After the Agreement for confidentiality, the SUN-BUG information was sent to, and received by, Plough. The confidential information was then shared with, at least, the third and fourth parties [Coppertone (A10,A36) and Company "X" (infra)]. When Plough became Schering-Plough Healthcare Corp., the company again shared the confidential SUN-BUG information with Company "X", corroborated by the sealed Supplementary Appendix "O". Therefore, Defendants, violating the Agreement, leaked the SUN-BUG information to [at least] third and fourth parties after the Agreement with the SUN-BUG partners. Instead of honoring the trust and confidence promise made between the founder and President and the four SUN-BUG business partners, Plough elected to breach the Agreement, and produced the SUN-BUG product on its own, through Company "X" whom they claim is a "third (sic) party".

The Defendants (then Appellee's) inaccurately stated:
"... *when Schering-Plough finally did introduce Bug & Sun, the formula was in part licensed from a third (sic) party.*"
[Appellee's Brief]

THE TRUTH - The Sun-Bug Information Was Leaked By Defendants And Then Utilized

Schering-Plough Defendants' sealed Supplementary Appendix includes new documents, previously withheld from the Plaintiff. Supplementary Appendix "O", demonstrates, that Plough did not like the exact formulation "offered" by Company "X" (Exhibit "A", page 36), but insisted on the SUN-BUG partners' precise concentration and formulation of 10% (Page 11, Section 4). This is shown on page 11 where Plough asked Company "X" to make for Plough, not Company

"X"s concentration of 30%, but the SUN-BUG formulation of 10% N,N-diethyl *meta*-toluamide. Their late-revealed sealed Appendix "O" demonstrates that the Defendants preferred and revealed the exact precise SUN-BUG insect formulation concentration to Company "X", a further breach.

LAW

Mr. Solmson's affidavit and deposition are evidence. Solmson finally admitted to receiving the SUN-BUG information, speaking about it, and transferring it to at least four individuals within the company and apparently one person outside of the company as well. BUG&SUN is a SUN-BUG knockoff from name to design to product formulation, and now Supplemental Appendix "O" demonstrates that Plough wanted that precise SUN-BUG formulation, rather than that which Company "X" suggested (Exhibit "A", page 36). The identical formulation and concentration, differing from Company "X" (supra), is consistent with the Plaintiff's complaint. Given the transfer and receipt of the confidential SUN-BUG information, its discussion in Plough, in Coppertone, and Company "X", and the utilization of the SUN-BUG information, Plough and he SUN-BUG business partners reached a valid, binding, and enforceable agreement.

For the Plaintiff, there has been detrimental reliance on the promise of Mr. Solmson and Plough, because he gave up something of value, and the defendants promised to give up something of value. The promise, detrimental reliance, should reasonably be enforceable as a contract to avoid injustice as Judge Young wrote [also *Loranger Constr. Corp. v. E.F. Hauserman Co.*, 376 Mass. 757, 760-61, 384 N.E.2d 176, 179-80 (1978)] noting that this principle comports with "traditional contract theory antedating the modern doctrine of consideration."].

There is a presumption of good faith and fair dealing [*Wilder v. Manley*] which means that neither party may do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract [*Fortune v. National Cash Register Co.*, 373 Mass. 96, 105, 346 N.E.2d 1251, 1257-58 (1977)]. Therefore, as a matter of law, the defendants had an Obligation to account honestly and honor their

agreements but have failed to so do. Because a contract is not to be held unenforceable if, when applied to the transaction and construed in the light of the attending circumstances, the meaning can be ascertained with reasonable certainty [*Doyle v. Hasbro*, 103 F.3d 186, 190 (1st Cir. 1996)], Plough should be held responsible for consequences of its acts [*Coll v. P.B. Diagnostic Systems, Inc.*, 50 F.3d 1115, 1122 (1st Cir. 1995); *Pultorak v. Lupien*, 1994 WL 902909 *2 (Mass. Sup. Ct., Oct. 11, 1994)]. The Defendants have failed to reply to Appellant's request that they cite law that permits their contract with a third (sic) party to void their previous contract *nunc pro tunc* even though consent of the previous parties was not obtained.

Whether the Court erred by Ignoring the Court Order of December 1999 for Discovery was not Carried Out.

Discovery was blocked by the Defendants' counsel. Notices of deposition were sent pursuant to both Judge Young's and Judge Gertner's Orders (A87,A95,A103). All of Plaintiffs efforts, including after he hired counsel, were sabotaged. In September 1999, the Plaintiff again made an effort to begin discovery. The Defendants refused. Thereafter, the Court Order of December 1999 ordered that Plaintiff be allowed to conduct discovery and to take 30(b)(6) depositions of the Defendants. Plaintiff made an effort to take discovery but Defendants opposed, obstructed and then evaded discovery by deposition. In the first months of 2000, the Defendants simply refused. At that time the official Court Order was not sent to Plaintiff, who repeatedly called both the Court, and then the Defendants' counsel, over two months asking for a copy of the Order. Neither provided it. It was only shared with the Defendants. Only on May 2, 2000, did Plaintiff finally receive by fax a copy from the Defendants. To Plaintiff's astonishment, the Order had been signed December 20, 1999, yet no official and timely copy of the Order was ever received by Plaintiff. On May 18, 2000 and then on May 19, 2000, Plaintiff again gave Notice of Deposition to the Defendants. The Defendants refused to provide the requested information necessary for a 30(b)6 Deposition. The Defendants failed to supply the requested addresses of key witnesses such as Barbara Carter or W H Chambliss. Meanwhile the Plaintiff cooperated with the Defendants. Plaintiff provided the addresses and telephone numbers of Dr. Berlin, Ms. Berlin, and Ms. Solomon to the Defendants' counsel and their four

depositions. There was never any similar reciprocity or cooperation by the Defendants.

Despite the Notice, on June 1, 2000, each of the Defendants scheduled for Deposition failed to properly appear with full, complete, and appropriate records as specified by the duly-received Schedule "B" for a deposition. They had defied J. Gertner's Court Order by a last minute May 30, 2000 letter indicating they would not appear, just as they had refused in 1999 and early 2000. Therefore, on June 1, 2000, Plaintiff filed a Motion for Compelling Order and Sanctions when the Defendants failed to show up for the sixth time. This was later covered up in its entirety by J. Collings, who essentially voided J. Gertner's Discovery Order (The lack of evenhandedness is discussed below).

Plaintiff notified and requested Defendants Schering-Plough Corporation and Schering-Plough Healthcare Products that their discovery depositions be taken on June 10 and June 11, 2000 (sixth attempt by Plaintiff). Instead of compliance, the Defendants' counsel refused, hung up the telephone, and then began their Motion for Sanctions against the Plaintiff which were intended to obfuscate the fact that they had disobeyed the Order of Judge Gertner. Instead of working with the Plaintiff for justice and reciprocity (the Defendants had at this point conducted five depositions with which the Plaintiff had complied), the Defendants attacked the Plaintiff. Judge Collings, whom the Plaintiff had previously appealed under Article III, came back into the case to protect the Defendants and deny Plaintiff even the appearance of justice. J. Collings unfairly awarded the Defendants sanctions against the Plaintiff even though the Plaintiff had complied and the Defendants had not. He unfairly and unjustly allowed the Defendants Motions while denying the 6/12/00 Motion for Sanctions against Defendants for failing to appear for any deposition.

To facilitate discovery, Plaintiff hired Attorney Evans Carter, however, the Defendants successfully squirmed out again. Discovery closed on September 1, 2000. The Defendants did not provide the requested required information necessary for a 30(b)6 Deposition and failed to comply with scheduling. There was no reciprocity. The Defendants failed to appear for, or accommodate, or schedule, their own Depositions over many months even after conducting four (4) Depositions for their side

in three (3) states. Furthermore, two of the Defendants' depositions involved sudden rescheduling by the Defendants leading to costly extra travel expenses for the Plaintiff. The Defendants were inflexible. Plaintiff offered them numerous opportunities for limiting the number of depositions, but the Defendants exploited the matter, attacked the Plaintiff, and ultimately refused. Defendants counsel always refused to give names, refused to give critical addresses and telephone numbers, and refused to give firm dates, instead they scuttled the depositions the "night before" (A116).

LAW

As noted on pages AB9-AB14 of the Appeal Brief, the standards of review were not followed [*Cates v. LTV Aerospace Corp.*, 480 F.2d 620 (5th Cir.1973), *LeGrice v. City of Brockton*, 99-10535, (D. Mass. July 13, 2000), *King v. Pratt & Whitney*, 161 F.R.D. 475 (S.D. Fla.1995), and *Hickman v. Taylor* (1947) 329 U.S. 495, 507)]. Defendants have failed to provide law to support their failure to cooperate in discovery (A86-A103) even though the Orders of Judge Young and Judge Gertner required them to do so. Even when Plaintiff retained Attorney Evans Carter to conduct a 30(b)6 deposition, did the court fail to enforce its own previous Orders and Decision. Given the funding of the court by the Defendants it has the appearance of impropriety.

The Court has not followed the standards of review, as discussed in the Appeal Brief on page AB30, where Appellant, cited *Multi-Core, Inc. v. Southern Water Treatment Co.*, 139 F.R.D. 262, 264 (D. Mass. 1991) because Plaintiff has a right to examine the appropriate relevant requested documents because they are material and will help prove Plaintiff's case. However, in this case, the Orders of Chief Judge Young and Judge Gertner were obstructed, impeded and then stopped by Decisions by a magistrate judge, in response to the petitioner protesting his action. The magistrate judge allowed zero (0) Discovery Motions of Plaintiff even when petitioner pointed out that Defendants failed to provide law to explain why they withheld key relevant documents, including those requested, critical and relevant, documents which follow and precede numbers Defendants' exhibits sheets #151, 152, 250 and 251 (A151 especially, also A87,A92,A157). On the sheets are the words, "SUN&BUG" – and not BUG&SUN, proving that there was a

pedigree line from SUN-BUG to BUG&SUN. These are critical and relevant. They and the documents which lead to them are important – but have never been seen by the Plaintiff. Defendants' withholding of documents which are critical and material to the case is unreasonable, and crafted only to prevent a fair trial [*Braaten v. Deere & Co.; Nastrom v. Nastrom; Multi-Core, Inc.*]. Plaintiff has a right to examine the appropriate relevant requested documents because they are material and will help prove Plaintiff's case.

The Court has not followed the standards of review because the denial of evidence and depositions of the Defendants is a salient denial of a fair trial by the Defendants. This is proven because normally, the Court has substantial interest in pretrial discovery to facilitate the search for truth and promote justice (*Hickman v. Taylor* (1947) 329 U.S. 495, 507). It is an affront to the judicial process to subvert and delay justice by denying Plaintiff access to material evidence and to depose Defendants.

The Court has not followed the standards of review because the Court Order of December 1999 ordered that Plaintiff be allowed to conduct discovery and to take 30(b)(6) depositions of the Defendants. Furthermore the magistrate judge acted unfairly and harshly improperly penalized a *pro se* Plaintiff knowing full well that said Plaintiff was only attempting to comply with Order of December 1999. That this occurred after Plaintiff filed an Appeal [00-1830] citing Article III and violation of said Discovery Order suggests that thereafter there has been a systematic appearance of retribution, law misapplied (and in one direction only), and therefore a possible appearance of impropriety.

The Court has not followed the standards of review because the Plaintiff properly filed the notice of deposition [*Cates v. LTV Aerospace Corp.*, 480 F.2d 620 (5th Cir.1973)] stating the time and place for the deposition and the name and address of the person to be examined [Fed. R. Civ. P. 30(b)(1)], and further specified the areas of inquiry with reasonable particularity relevant to the present Complaint [*Marker v. Union Fidelity Life Ins. Co.*, 125 F.R.D. 121 (M.D.N.C. 1989)]. The Defendants failed to cooperate in said discovery and have delayed justice by denying Plaintiff access to material evidence in salient violation of Federal Rules Civil Proc. 1 and 26 (A86-A103). The Defendants should not have been systematically excused from

appearing for deposition through their continued non-cooperation [*LeGrice v. City of Brockton*, 99-10535, (D. Mass. July 13, 2000); also King v. Pratt & Whitney, 161 F.R.D. 475 (S.D. Fla.1995)].

The summary judgment under Rule 56 is improper because the Plaintiff filed an affidavit explaining the inability to fully present facts to oppose the motion because of limited discovery [*Public Serv. Co. of Cob. v. Continental Casualty Co.*]. The Court has not followed the standards of review because discovery was not complete without the implementation of Judge Gertner's Order. Plaintiff has a right to examine the appropriate relevant requested documents and depose Defendants about these issues because they are material and will help prove Plaintiff's case. [*Ares-Serono, Inc. v. Organon Intern. B.V.*, 151 F.R.D. 215 (D.Mass. 1993)]. Egregiously, the incomplete discovery did occur in the light of Defendants' history of destruction of documents, withholding key documents, the refusal to attend depositions, and the filing of obfuscating Motions against the Plaintiff to prevent a fair trial [*Braaten v. Deere & Co.*, Inc., 1997 ND 202, ¶9, 569 N.W.2d 563; *North Dakota Supreme Court Opinions, Nastrom v. Nastrom*, 1998 ND 142, 581 N.W.2d 919 Filed July 16, 1998]. Thus, petitioner has been restrained [*Turmenrte v. White Consolidated Indus., Inc.*, 266 F. Supp. 35, 37 (D. Mass. 1967); also *Gentron Corp. v. H.C. Johnson Agencies, Inc.*, 79 F.R.D. 415, 419 (E.D. Wis. 1978)].

Whether the Court erred by ignoring that there Is Not A Conflict Regarding Dr. Berlin.

Defendants' counsel made false statements about Dr. Berlin unsupported by the pleadings (A81,A202,A231,A55,A11) but made for innuendo and *ad hominem* by the Defendants' counsel, falsely made because the Defendants' cannot rebut Dr. Berlin's (and the other deponents') testimony (A81,A202,A231,A55,A11), or the fact that he was referring to other depositions which corroborated his earlier affidavit. By taking portions of Dr. Berlin's pleadings out of context, the Defendants counsel creates pseudo-conflict where there is none, to trick the court. There is only a difference in the description of those pleadings by the Defendants attorneys. The purported "*contradiction*" involves Dr. Berlin repeating Ms. Solomon's statement, and in the other case he reported what was told directly to him.

These two recitations are not contradictory, despite that they were taken out-of-context to create that impression. Dr. Berlin refreshed his memory between the time of his first affidavit in April 1999 and his third affidavit more than two years later. Dr. Berlin read, and did refer to, the depositions of Ms. Solomon, Ms. Berlin and Mr. Solmson. Dr. Berlin described an event from different viewpoints (his and Ms. Solomon). In one case, Dr. Berlin repeated what was told the business partners by Ms. Solomon, and in the other case reported what was told to him. They are not contradictory, but have slickly been taken out of context to create that impression by the Defendants' counsel. In fact, the evidence (A36,A202,A31) shows that it is Mr. Solmson and Plough and the other Defendants who have conspired and acted egregiously -- and have submitted documents in a contradictory fashion to obstruct and delay justice.

The innuendo and *ad hominem* by the Defendants' counsel was made because the Defendants have failed to be substantive and detailed any other purported contradictions. Thus, they have refused requests to be precise and substantive because their misstatements are simply unsupported by the pleadings (A81,A202,A231,A55,A11) and there are no significant differences between any of the testimonies of Dr. Berlin. Corroborating this, Defendants have failed to reply to the fact that there was incredible trust and confidence between three of the SUN-BUG business partners and Plough through family relations to both Mr. Abe Plough (founder) and Mr. Harry B. Solmson (President of the Plough company) over several generations, confirmed by five depositions (A8,A11, Dr. Robert Berlin; A21, Ms. Solomon Marks; A65,A81, Mr. Harry Solmson).

In 1975, only on the basis of said trust and confidence, were Mr. Plough and Mr. Solmson able to shepherd four young adults to deliver and entrust the confidential SUN-BUG information to Plough. Thereafter, good faith required Plough, and later Schering-Plough, to act fairly (A1,A2), to keep the information confidential, and to conclude the second agreement for licensing, as discussed in Judge Young's Decision.

LAW

The Court has not followed the standards of review because Plaintiff's pleadings which introduced the affidavit gave a satisfactory explanation of why the testimony differed. Corroborating this, the Defendants' affidavits are not even proper pursuant to Rule 56(e) because they are based on Defendants' counsels' inaccurate statements [*Automatic Radio Mfg. Co. v. Hazeltine Research Inc.; Tavery v. United States; Conner v. Sakai; Toro Co. v. Krouse, Kern & Co.*], conclusory averments [*Cifarelli v. Village of Babylon*], and self-serving statements [*Evans v.Technologies Applications & Serv. Co.*; Hall v. Bellmon] presented without benefit of firsthand observation [*Visser v. Packer Eng'g Assocs., Inc.*].

The Court has not followed the standards of review because in that the record is evidence [affidavits, depositions of five (5) deponents] which supports the Plaintiff's and Dr. Berlin's statements (A55, A020) and presents a sufficient disagreement to require its submission to a jury [*Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 594 (11th Cir.1995)]. Under the well-established standards for summary judgment, there are clearly genuine issues as to many materia. facts and, therefore, the defendants are not entitled to summary judgment as a matter of law. [Fed. R. Civ. P. 56(c)].

The Court rejects the reasoning of the Appeals Court [*Marino v.Hyatt Corporation*, 793 F.2d 427, 430 (1st Cir. 1986)]; *Morrill v.Tong*, 390 Mass. 1207 129 (1983); *Chelebda v.H.E. Fortuna & Brothers Inch*, 609 F.2d 1022 (1st Cir. 1979)]. The Court's allowance of Summary Judgment is inappropriate because the Court has relied upon affidavits of Defendants' counsel, whereas to support a summary judgment motion, an affidavit must be based on personal knowledge [*Evans v. Technologies Applications & Serv. Co.; Leary v. Dalton*]. Plaintiffs affidavits set forth facts that would be admissible at time of trial, and establishes each of the affiant's competence to testify. Affiants of the Plaintiff were witnesses, and unlike the Defendants' pleadings, Plaintiffs affidavits have been based on personal knowledge.

The Court has not followed the standards of review because Defendants' argument relies on a case of two people involved

with the sale of land [*Held v. Zamparelli*, 13 Mass. App. Ct. 957 (Mass. App. Ct. 1982)]; a case not relevant to this case where there are decades of trust and confidence between the highest levels of Plough [Founder and the President] and three of the SUN-BUG business partners. Their cited case is devoid of that essential relationship. Furthermore, in the Appellee's new arguments made to the ONLY court of appeals and not in the court below, the legal case upon which the Defendants rely is one where the court excluded a later affidavit because the opponent had "no memory" [*Unterreiner v. Volkswagen of America, Inc.*, 8 F.3d 1206, 1210 (7th Cir. 1993)]. The court should reasonably recognize that there are significant and salient differences. First, there is quite a different situation in this case where Dr. Berlin significantly remembered details in his initial affidavit. Second, there were long-standing relationships of trust and confidence between the parties in this case. Third, Dr. Berlin's comments have been corroborated by five depositions. Fourth, Dr. Berlin had the opportunity to further refresh his memory through the depositions of Ms. Solomon and Mr. Solmson, to which he did later refer.

The Court has not followed the standards of review because attention of the court is directed to the sealed Supplemental Appendix "O". It can be seen that the proposed royalty to Company "X" is exactly the same as that royalty reported to Ms. Solomon and discussed by Dr. Berlin. This further corroborates the accuracy of Dr. Berlin, and further explains why the Defendants' want to eliminate his testimony.

The Court has not followed the standards of review [*Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994), *Torres*, 219 F.3d 13, 20-21 (1st Cir. 2000)] and so there is an abuse of discretion and an appearance of impropriety by having only Dr. Berlin's testimony struck.

Whether the Court erred by denying access to a fair trial.

The Court has not been impartial because it has ignored that SUN-BUG information was sent to Plough. The Report's statements are contradicted by the five depositions (A55,A8-A81,A202,A231), by the confirmation that confidential SUN-BUG technology was transmitted (A9,A10,A55,A202), and even by the knockoff equivalence of SUN-BUG to BUG&SUN. Schering-Plough Corporation, Plough U.S.A., and

Schering-Plough Healthcare Products, did reap what they did not sow. The Court has not been impartial because the erroneous Judgment is based upon Defendant's false statements and perjury. This is not supremacy of law. The Defendant Plough has not even had to answer this Court or to appear for a deposition. Defendants' actions have frustrated and hindered efforts to maintain Court orders and the decision of J. Young. Defendants have exhibited abuse of both due process and power [*Gamez v. Toledo,* 100 S. Ct. 1920]. Summary judgment under Rule 56 is improper because it is predicated upon Solmson's testimony and Defendants' counsels' affidavits submitted under Rule 56(c) or Rule 56(f) in bad faith (A231).

Whether the Court erred by being biased against Petitioner with respect to Rule 7.1.

The *pro se* Plaintiff had to comply with rule 7.1, whereas the defendants counsel need not even comply with rule 7.1 at all. The magistrate judge made denials made for lack of compliance with Local Rule 7.1 (A87). The unfairness of the court regarding Local Rule 7.1 (A87) was discussed in the Appeal Brief on pages AB45 with specificity. He wrote on the left hand side of each Motion: **"None of the motions contain the certification required by the law"**. Astonishingly, this was never required for any of the Defendants' counsels' Motions, including their obstructive and abusive Motion for Sanctions. As a result, all of the Plaintiffs motions were denied for purportedly failing to comply with Local Rule 7.1 (A87), but in contrast none of the defendants motions –including those which awarded sanctions against the Plaintiff for false statements made by the defendants counsel– were ever submitted in compliance with said rule. The court went beyond discretion to exclude Dr. Berlin's pleadings yet include those of Mr. Solmson [when there was an unfounded allegation made against Dr. Berlin, whereas it was Mr. Solmson who was contradictory in each pleading], as discussed in the Appeal Brief on pages AB33. Further unfairness results from the fact that the defendants have not had to provide specific, precise, detailed evidence.

Whether the Court erred by Ignoring Defendants' False Statements And Inconsistencies.

The Court has not followed the standards of review because it has ignored, and adopted, the disingenuous statements of

Mr. Solmson and Defendants' counsel as to several material facts in issue. These were made in light of defendants' spoliation of evidence. The inaccuracies were brought to the attention of the Court with an extensive affirmative showing of said misstatements and therefore the summary judgment under Rule 56 is improper because it is predicated upon Defendants' affidavit and pleadings submitted under Rule 56(c) or Rule 56(f) which were presented in bad faith (A231).

The Defendants misled the court in April 1999, when Defendant's counsel argued that Mr. Harry Solmson was too old and too senile to be contacted, that he was "*unavailable*", and that he had no knowledge of Dr. Berlin or SUN-BUG. These statements, like so many others by the defendants' counsel thereafter, were not true. As revealed by Dr. Robert Berlin in his Declaration, and confirmed at Deposition, Mr. Solmson - thereafter - was at that time in contact with the mother of one of Plaintiff's witnesses and the mother-in-law of Dr. Berlin. Dr. Berlin brought to the Court's attention that Mr. Solmson had the time and good health to meet with Ms. Berlin's mother, conveniently just before the Deposition of Ms Berlin in this case. Plaintiff sent to the Court documents that demonstrated Mr. Solmson was OK and had recently visited Plough in 1999. As Mr. Solmson stated in Plough's newsletter, "*I am doing OK for one who will be 88 next month. We had a great group of people at Plough, Inc., and I miss them*".

The Defendants then misled the court claiming there was no close relationship. However, the Defendants' statement was untrue, as revealed by Dr. Robert Berlin, Ms. Berlin, Ms. Solomon and even at the deposition of Mr. Solmson. As the depositions showed, both Plough President Harry Solmson and the founder (Mr. Abe Plough) attended the wedding of two of Plaintiff's business partners: Mr. Solmson admitted that he was deeply involved in financial issues of two of the partners. There was incredible trust and confidence from the founder and President who shepherded four relatively naive young adults to entrust them with the confidential SUN-BUG information.

Proven disingenuous, the Defendants then deliberately misled the court claiming there was no company knowledge of SUN-BUG or Dr. Berlin. The Defendants continued this deception in their "Answer" to the Complaint, when on June 28, 1999, in their paragraphs 6 and 7, they purported to have no "*knowledge or information*" of Plaintiff's business partners or of

SUN-BUG. These of Defendants' statements were also untrue. Despite the lame claims of *"no knowledge"*, both the President of Plough (Mr. Harry Solmson) and the founder of the company (Mr. Abe Plough) attended the wedding of two of Plaintiff's business partners, and Mr. Solmson would soon admit in deposition that he was deeply involved in financial issues of the two of the partners.

Proven disingenuous, there followed serious important inconsistencies in Mr. Solmson's Deposition. Mr. Solmson first claimed he did not speak to Dr. Berlin on the telephone (A36,A11,A81) but then admitted that he had learned about SUN-BUG from Dr. Berlin and that, in fact, Mr. Solmson had called Dr. Berlin (A43). Despite the false statements by Defendants counsel, Dr. Berlin and Mr. Solmson remember speaking to each other about SUN-BUG more than once. Dr. Berlin remembers the rank of those to whom he spoke, and it has been corroborated by Solmson. Defendants' counsel then misstated the truth to the magistrate judge [pages 32, lines 13-19 of the Transcript from the 12/8/99 Hearing] when Defendants' counsel falsely claimed there were *"no papers"* in this case, *"no documents with (Plaintiff's) name or any of his business partners..."*. This was again untruthful. Defendants were sitting on Mr. Solmson affidavit prepared 6/99 but which would not released to the Plaintiff until twenty-four hours or less before Mr. Solmson's deposition in 1/00]. When caught in their last misstatement to the federal court, the Defendants' counsel purports in new argument to the appeal court that Mr. Solmson had no authority. That is ludicrous. Mr. Plough founded the company, and Mr. Solmson was the President of the company -- and Mr. Plough's son-in-law. That is false and *ad hominem*.

There has not been a normal standard of review because the court used a double standard of review, where the *pro se* witness is held to a higher standard than Mr. Solmson [who was protected by three (3) law firms [Bingham-Dana, the Defendants' internal counsel, and his own legal firm in Florida]. Mr. Solmson and Defendants counsel have systematically given the Court false information. Accordingly, the plaintiff has shown competent credible evidence to rebut and dispute the motion for summary judgment [*Mesnick v. General Elec. Co., P. & JY. of Kingston. Inc. v. Massachusetts Commission Against*

Discrimination] and to support the plaintiffs complaint. In this case, there is two-tier system which allows Mr. Solmson's inaccuracies and contradictions to be ignored, and Dr. Berlin's clear testimony to be dismissed is inconsistent with U.S.Rep, 404, 520-521 (1972), as Appellant cited on page AB46 of the Appeal Brief

The court should have concluded that a fuller factual development is necessary [*Kennedy v. Silas Mason Co.*]

There has not been a normal standard of review and there is an apparent abuse of discretion for the court did exclude Plaintiffs' witnesses with specificity of charges, and ignore the previous Decisions and discovery orders. In this case there has been systematic abuse of discretion. [*Torres v. E.I. Dupont De Nemours & Company*, 219 F.3d 13, 21 (1st Cir. 2000) (quoting *Lennon v. Rubin*, 166 F.3d 6, 8 (1st Cir. 1999) (in turn, quoting *EEOC v. Green*, 76 F.3d 19, 24 (1st Cir. 1996)).] This is evidence that the lower court has two different standards of review is salient mathematical proof of bias, with the appearance of possible impropriety.

Whether the Court erred by ignoring Inequitable Conduct.

After Chief Judge Young's Decision, the defendants hired the law firm with which the Judge consulted or had worked, and the judge was forced to recuse himself. Thereafter, because of said action of the defendants, the court was not guided by Judge Young's Decision. Thereafter, Plaintiff was not given opportunity for defaulting a non-responding defendant, was not allowed discovery, and was punished as a *pro se* litigant even though defendants admitted to destroying records, withholding the Solmson affidavit (while being disingenuous to the public through the *Boston Globe* of which they are counsel) and have given disingenuous testimony with impunity to several judges (*supra*).

CONCLUSION

The petitioner has shown noncompliance with the standards of review in summary judgment. Two key issues of material fact prove that outcome should have been determined by jury rather than fiat.

A valid, enforceable contract was entered into between the parties by their oral statements, acts and deeds between December, 1975 and April, 1976 (A1-A85). Schering-Plough followed by reaping what it did not sow by selling an exact utilization of the SUN-BUG information (A4,A5,A55) – identical to SUN-BUG, in formula and amount, even down to the angle between the side groups on the molecule (A4-A7).

The cited patent was about ethylene-maleic anhydride copolymer and has nothing to do with SUN-BUG or BUG&SUN. Thus, the petitioner did show competent credible evidence to rebut and dispute the motion for summary judgment [*Mesnick v. General Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991), *P. & JY. of Kingston. Inc. v. Massachusetts Commission Against Discrimination*, 20 F.Supp.2d 153, 155 (D.Mass 1998)] because the Defendants are not entitled to judgment as a matter of law.

The record shows noncompliance with the standards of review because Judge Young set up guidelines involving "information" transfer and whether Dr. Berlin could have been a party in the present action to make his voice heard. The final judgment is not compliant with said 1999 Decision and gives no reason for the change. This has the appearance of impropriety because the petitioner came forward with significant evidence and a demand for jury trial of the issues [*In re Ralar Distrib. Inc.*, 4 F.3d 62, 67 (1st Cir. 1993); *Logan Equip. Corp. v. Simon Aerials, Inc.*, 736 F. Supp. 1188, 1195 (D. Mass. 1990)] supported by submitted, substantive, significant and probative evidence and testimony in the record, thereby requiring its submission to a jury [*Jeffery v. Sarasota White Sox*, Inc., 64 F.3d 590, 594 (11th Cir.1995)]. The petitioner submits that the law and the Decision of Judge Young should be upheld because said jury would reasonably find in the Plaintiff's favor [*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-52, 106 SCt. 2505, 2510-12, 91 L.Ed.2d 202 (1986)].

The record shows noncompliance with the standards of review because the court has elected to avoid accountability and ignore Defendants' tardive admission of destruction of documents, and the record which proves withholding of a key document, refusal to attend deposition, and the slick use of obfuscating Motions, all designed to shift "information" to

"documents" and to prevent a fair trial [*Braaten v. Deere & Co., Inc.*, 1997 ND 202, ¶9, 569 N.W.2d 563; North Dakota Supreme Court Opinions, *Nastrom v. Nastrom*, 1998 ND 142, 581 N.W.2d 919 Filed July 16, 1998]. In this light, the court should conclude that a fuller factual development is necessary [*Kennedy v. Silas Mason Co.*, 334 U.S. 249, 68 SCt. 1031, 92 L.Ed. 1347 (1948)] because the submitted Affidavits and the evidence in record supports genuine disputes over facts that will effect the outcome of the contractual claim [Anderson v. Liberty Lobby, Inc.].

The record shows noncompliance with the standards of review because the petitioner's counsel (at the time) filed an affidavit explaining the inability to fully present facts to oppose the motion because of limited discovery [*Public Serv. Co. of Colo. v. Continental Casualty Co.*] and failure of the court to uphold Judge Gertner's discovery Order. Thus, summary judgment is not proper because of the one-sided allowance of discovery and inadequate period for discovery [*Vaughn v. United States Small Business Admin.*, 65 F.3d 1322, 1325 n.1 (6th Cir.1995)] and because petitioner has a right to examine the appropriate relevant requested documents and depose Defendants about these issues because they are material and will help prove Plaintiff's case [*Ares-Serono, Inc. v. Organon Intern. B.V.*, 151 F.R.D. 215 (D.Mass. 1993); also *Turmenrte v. White Consolidated Indus.*, Inc. 266 F. Supp. 35, 37 (D. Mass. 1967); and *Gentron Corp. v. H.C. Johnson Agencies, Inc.*, 79 F.R.D. 415, 419 (E.D. Wis. 1978)].

The record shows noncompliance with the standards of review because the Court did not follow the standards of regarding discovery. It was never even-handed.

The record shows noncompliance with the standards of review because the court has used Defendants' counsels' misstatements and "cherry-picking" of portions of the Depositions to evade justice. Such affidavits which are inaccurate are not proper [*Automatic Radio Mfg. Co. v. Hazeltine Research Inc.*, 339 U.S. 827, 831, 70 S.Ct. 894, 896, 94 LEd. 1312 (1950); *Tavery v. United States*, 32 F.3d 1423, 1426 n. 4 (10th Cir.1994); *Conner v. Sakai*, 15 F.3d 1463, 1471 (9th Cir.1993), cert. granted; *Toro Co. v. Krouse*, Kern & Co.,827 F.2d 155, 162–63 (7th Cir.1987)]. Furthermore, such conclusory averments

[*Cifarelli v. Village of Babylon*,93 F.3d 47, 51 (2d Cir.1996)] and self-serving statements [*Evans v.Technologies Applications & Serv. Co.; Hall v. Bellmon*, 935 F.2d 1106, 1111 (10th Cir.1991)] without benefit of firsthand observation [*Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 659 (7th Cir.1991)] are improper.

The record shows noncompliance with the standards of review because the court has shown unfairness by ignoring the inconsistencies in Mr. Solmson's pleadings and unfairly removing Dr. Berlin's pleadings. This is wrongful because an affidavit must be based on personal knowledge [*Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir.1996); *El Deeb v. University of Minnesota*, 60 F.3d 423 (8th Cir.1995); *Leary v. Dalton*, 58 F.3d 748,754 (1st Cir.1995)]. By contrast, petitioner's Affidavits were ignored, and should have been taken as true (*Lewis v. Bours*, 119 Wn.2d 667, 670 (1992)) because the evidence far exceeded all requirements [*Droukas v. Divers Training Academy*, 375 Mass. 145, 159 (1978); *Marino v. Hyatt Corporation; Morrill v. Tong; Chehbda v. H.E. Fortuna & Brothers*]. In this light, and the prism of J. Young's previous Decision, the court was obligated to mention and discuss petitioner's, petitioner's lawyer's, and Dr. Berlin's comments, but did not. If there had been fair standards of review said submitted Affidavits and content would have been discussed somewhere in the Report. Instead, the report simply rubber-stamped the Defendants' affidavits which were submitted in bad faith.

What is not in dispute is that this Judgment is in conflict with the law.

What is not in dispute is that erroneous Judgments foster untruthfulness, withholding evidence, spoliation of evidence, abuse of *pro se* litigants, and an ultimate lack of disrespect of the people for the court.

What is in dispute is whether Defendant's counsel can substitute inaccurate statements and cherry-pick excerpts to be "rubber-stamped", even as the full, indelible, evidence sits in the court records.

What is in dispute is whether the Plaintiff shall be granted hope of relief in a court, consistent with the doctrine of equality

under the law. This is not an instance of a court merely interpreting a law one way over another, but of systematically disregarding two (2) previous Decisions, and law and then failing to properly apply the laws –including those which explicitly direct how patents must be used in Federal cases.

Supremacy of law suggests that the court take jurisdiction of the subject matter. Both accountability and the doctrine of equal protection under the law require that the original above-entitled complaint not be dismissed.

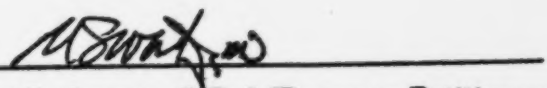
This court has final supervisory jurisdiction over the subject matter and should investigate and then consider correcting this situation. There may be inadequacies and a lack of normal attorney eloquence in this Brief, but the Appellant is not a lawyer, and is *pro se*, and requests said examination of said subject matter because this court has ruled that any *pro se* litigant is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (1972)].

The petitioner respectfully requests reversal of Motion of Summary Judgment and a remand for those issues of material fact which remain to be tried, and where the Defendants are not entitled to a summary judgment in their favor as a matter of law.

The petitioner requests reversal of the denial of the Motion for a Default with respect to Mr. Kirn at Plough (A117).

Wherefore, Petitioner respectfully requests that this petition for writ of certiorari be granted.

Respectfully submitted,



Mitchell R. Swartz, ScD, MD, *pro se*, Petitioner
P.O. Box 81135
Wellesley Hills, MA 02481-0001

IN THE

Supreme Court of the United States

Mitchell R. Swartz, Plaintiff,
Petitioner

v.

Schering-Plough Corporation, Plough U.S.A.,
Schering-Plough Healthcare Products,
Defendants,
Respondent

On Petition For A Writ Of Certiorari
To United States Court Of Appeals
For The First Circuit
No. 02-1001

Appealed from: United States District Court
District Of Massachusetts
(Civil Action No. 99-CV-10177)

APPENDICES

APPENDIX A - JUDGMENT AFFIRMING DISTRICT COURT WITHOUT ANY SUBSTANTIVE COMMENT
02-1001

Issuing Court: US Court of Appeals for the First Circuit
Number of Case: 02-1001
Date of Denial: 9/24/02

United States Court Of Appeals For The First Circuit
No. 02-1001

Before BOUDIN, Chief Judge, TORRUELLA, Circuit Judge, and LIPEZ, Circuit Judge.

JUDGMENT

Entered: September 24, 2002

We have carefully reviewed the record n this case, including the briefs of the parties. We affirm the grant of summary judgment essentially for the reasons given by the magistrate judge in his report and recommendation, dated September 27, 2001.

AFFIRMED.

By the Court::
-s Richard Cushing Donovan
Clerk

Dated: September 24, 2002

APPENDIX B

Excerpt of Memorandum and Order
of Chief Judge William Young
[A202,A231; Swartz v. Schering-Plough Corp., 53F.Supp.2d95, 103 (1999)]

"The pleadings also give rise to reasonable inferences that Swartz turned over SUN-BUG information on the conditions that (i) the information would be kept confidential, and (ii) the Schering Defendants would proceed with good faith licensing negotiations at any time they chose to produce a dual-action sunscreen product."

"Finally, the Schering Defendants argue that the Amended Complaint expressly States that no agreement was ever reached between the parties. Once again, the Schering Defendants are mistaken. While it is true that the Amended Complaint states that plaintiff and Defendant at never reached an agreement regarding the said confidentially-transmitted and shared idea, business, plan, formula, design technology and trademark known as SUN-BUG, this allegation refers to the failure to come to terms on a licensing agreement – not a confidentiality agreement."

Memorandum and Order of J. Young, 1999; A202,A231;
Swartz v. Schering-Plough Corp., 53F.Supp.2d95, 103 (1999)

APPENDIX C

Excerpt of Decisions Involving the "Novelty" of an Invention

Definitions of "identical" or "new":

> **"... rejections under 35 USC 102 are proper only when the claimed subject matter is identically disclosed or described in "the prior art".**
> [*In re Arkely, Eardley and Long*; 172 U.S.P.Q.524,526(CCPA, 1972)]

In this case, the cited patent is NOT the same as SUN-BUG or BUG&SUN Therefore, the cited patent is not relevant and is relied upon improperly.

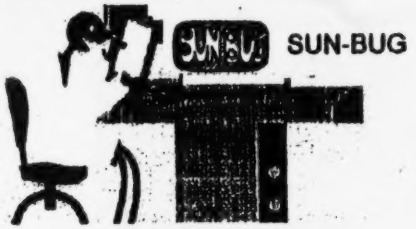
> **"It is wrong to use the patent in suit [here the breach of contract] as a guide through the maze of prior art references, combining the right references in the right way to achieve the result of the claims in suit [here the use of an irrelevant patent in the presumption that the a different invention and the cited patent might be the same]. Monday morning quarterbacking is quite improper when responding the question of nonobviousness in a court of law [here the Report]."**
> [. Orthopedic Equipment Co. Inc. v United States, 217 U.S.P.W. 193, 199 (CAPC 1983)]

In this case, the cited patent must be used for what it really states, and the cited patent leads away from SUN-BUG.

> **"This court has said that '(all of the disclosures in a reference must be evaluated for what they fairly teach (emphasis added) one of the ordinary skill in the art.'"**
> [Court of Custom and Patent Appeals [In re Langer and Haynes, 175 USPQ 169, 171 (CCPA 1972)]

APPENDIX D - The SUN-BUG to BUG&SUN Timeline
HOW PLOUGH TOOK "SUN-BUG" AND MADE IT INTO "BUG&SUN"

Dr. Swartz invents optimal performance dual protection SUN-BUG. Dr. Swartz, Elizabeth Solomon (now Marks), Dr. Robert Berlin and Katherine Berlin become business partners and start company using Dr. Swartz's SUN-BUG.

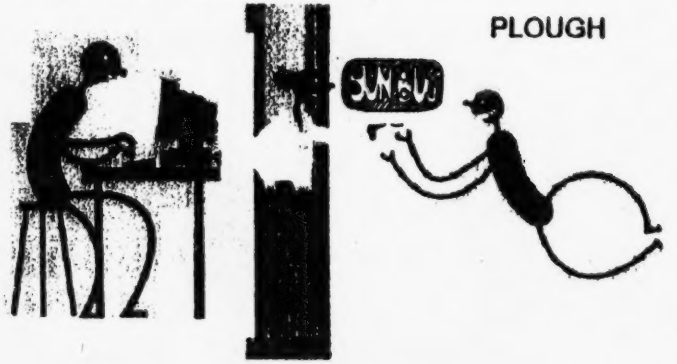


Three partners [Berlins and Solomon] are linked with very long-standing close family ties to both the CEO and Founder of Plough, Inc., Mr. Solmson and Mr. Plough respectively. Inquiry is made.

Mr. Solmson, with fiduciary responsibility to two of the four business partners, "pooh-poohs" the need for a formal written confidentiality agreement due to long-standing family trust and confidence involving both Berlins and Mr. Solmson (CEO) and Ms. Solomon and Mr. Plough (founder). Based on this, the SUN-BUG business partners trusted Plough to do the "right thing".

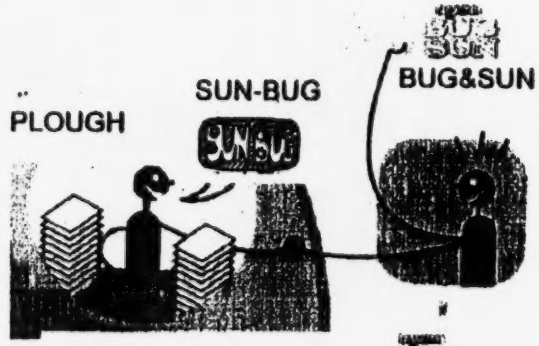
APPENDIX D - The SUN-BUG to BUG&SUN Timeline (Part 2)

Based upon the trust and confidence, Dr. Swartz prepares and sends information, package, product and materials to Plough. Additional information and other materials are sent by Dr. Berlin to Mr. Solmson.



The SUN-BUG information is received because Mr. Solmson shares the SUN-BUG idea with at least four individuals within Plough.

The SUN-BUG information is received because Mr. Solmson calls Dr. Berlin back.
Dr. Berlin is informed that SUN-BUG is ready for production but Plough will contact Dr. Berlin, Ms Berlin, Ms. Solomon and Dr. Swartz if they elect to make SUN-BUG.



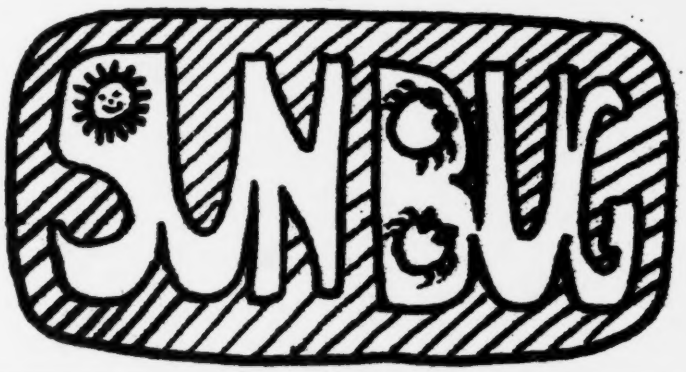
Mr. Solmson reveals in his deposition [1/2000] that there have been secret industry-wide agreements to "not keep records" of incoming ideas, but some of these materials manage to "reappear" at a later time. Plough holds onto the ideas which are shared for later use.

In this case, Plough systematically changes SUN-BUG to SUN&BUG, and then finally to BUG&SUN with other individuals.

BUG&SUN hits the market.
Plough breaks its agreement and reaps what it did not sow.

APPENDIX E -
Near Identical Logos and Names of SUN-BUG and BUG&SUN

SUN-BUG 1975



BUG&SUN 1999